

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL DAVID JOHNSON,
Plaintiff,
v.
A. CUEVAS, et al.,
Defendants.

Case No. [21-cv-05264-JSW](#)

**ORDER GRANTING
RECONSIDERATION; VACATING
JUDGMENT; REVOKING IN FORMA
PAUPERIS STATUS; TO PAY FILING
FEE**

Re: Dkt. No. 26

Plaintiff was granted leave to file an amended complaint, but the case was then dismissed because the Court did not receive his amended complaint before the deadline. Shortly thereafter, Plaintiff filed his amended complaint. In light of the fact that Plaintiff is proceeding pro se and is incarcerated, the lateness of his amended complaint is excused. Reconsideration of the dismissal order is GRANTED, the judgment is VACATED, and the case is REOPENED.

Plaintiff was previously granted leave to proceed in forma pauperis. The Prison Litigation Reform Act of 1995 ("PLRA") provides that a prisoner may not bring a civil action or appeal a civil judgment under 28 U.S.C. 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). A prisoner must be given notice of the potential applicability of Section 1915(g), by either the district court or the defendants, but the prisoner bears the ultimate burden of persuasion that Section 1915(g) does not bar pauper status for him. *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005).

Plaintiff has had three or more cases or appeals that qualify as dismissals under Section 1915(g), i.e. "strikes." See *Johnson v. Davis*, Case No. 21-15093 (9th Cir., Sept. 17, 2021);

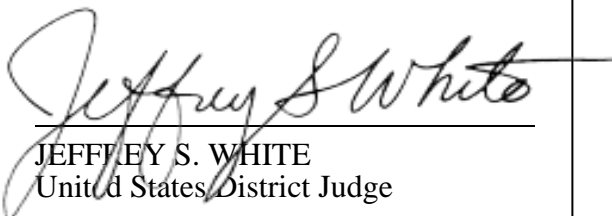
1 *Johnson v. Agpoon*, Case No. 21-15606 (9th Cir., Sept. 16, 2021) (appeal dismissed as frivolous);
 2 *Johnson v. Agpoon*, Case No. 20-cv-06676-LHK (N.D. Cal., Mar. 9, 2021) (dismissed for failure
 3 to state a claim upon which relief may be granted); *Johnson v. Davis*, Case No. 20-cv-02851-LHK
 4 (N.D. Cal., Jan. 4, 2021) (dismissed for failure to state a claim upon which relief may be granted);
 5 *Johnson v. California Prison Industry Authority*, Case No. CIV S-11-0164 CKD P (E.D. Cal.,
 6 Dec. 21, 2011) (dismissed for failure to file amended complaint after dismissal for failure to state a
 7 claim upon which relief may be granted); *Johnson v. Sisto*, Case No. 08-cv-01962-RRC (E.D. Cal., July
 8 26, 2010) (dismissed for failure to state a claim upon which relief may be granted).

9 As Plaintiff has at least three strikes, he may not proceed in forma pauperis unless he was
 10 in any imminent danger of serious physical injury when he filed this case. The plain language of
 11 the imminent danger clause in Section 1915(g) indicates that "imminent danger" is to be assessed
 12 at the time the prisoner filed his case. *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007).
 13 The complaint sets forth no imminent danger --- the allegation is simply that Plaintiff was not
 14 allowed to return to the law library in violation of his Equal Protection rights. The imminent
 15 danger exception does not apply.

16 Leave to proceed in forma pauperis is REVOKED. Within **28 days** of the date this order is
 17 filed, plaintiff must pay the full \$350.00 filing fee; **failure to do so will result in the dismissal of**
 18 **this case without prejudice to Plaintiff bringing his claims in a new civil rights case in which**
 19 **he pays the filing fee.**

20 **IT IS SO ORDERED.**

21 Dated: January 17, 2023

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 24 JEFFREY S. WHITE
 25 United States District Judge
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